

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1893

IN THE MATTER OF:

Served September 29, 1978

Application of EDWARDS TRUCKING)
COMPANY, INC., for Temporary)
Authority to Perform Charter)
Operations Pursuant to Contract -)
U. S. Department of Justice)

Case No. AP-78-27

By application filed August 17, 1978, as supplemented, Edwards Trucking Company, Inc. (Edwards), seeks temporary authority to transport passengers, and mail in the same vehicle with passengers, in charter operations pursuant to a contract with the United States Department of Justice (DOJ), between the facilities of DOJ located at 10th Street and Constitution Avenue, N. W., Washington, D. C., and the facilities of DOJ located at One Tyson's Corner Center, Fairfax County, Va. Edwards proposes to use one 1976, 15-passenger van to provide three round-trips each business day between said points. The proposed price for this service is \$80 a day according to Edwards.

In support of the application, Edwards states that it is the only carrier qualified to provide the service because DOJ's procurement is pursuant to a "sole source" contract instituted under the "8A program" of the Small Business Administration (SBA) and Edwards has been selected as the "sole source" of the services required.

Beltway Limousine Service, Inc. (Beltway), and Executive Limousine Service, Inc. (Executive), have filed protests to the application. Both Executive and Beltway are authorized by the Commission to engage in charter operations between the sought termini. The "sole source" criterion for disqualification of Beltway and Executive is all that stands between Edwards and a denial of this application, for under long-standing interpretation of the section of the Compact governing grants of temporary authority 1/ the availability of a carrier with pre-existing operating rights to perform a given service would preclude a grant of temporary authority to an uncertificated applicant. 2/

1/ Compact, Title II, Article XII, §4(d)(3).

2/ The same interpretation of the counterpart section 210a(a) Interstate Commerce Act (49 U.S.C. 310a(a)) is followed by the ICC (Black Ball Freight Service v. United States, 298 F.Supp. 1006 (1969), rev'd on other grounds, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 673 (1970)).

Beltway asserts that it has been actively soliciting the business of DOJ for the past year and has prepared a complete financial and operational study for DOJ on the advantages of contracting shuttle and mail services to private carriers. Beltway, although not minority-owned, has received funds from the SBA and believes that the subject contract should be published for competitive bidding.

Executive also asserts that it stands ready, willing and able to provide the subject transportation. This carrier has one idle van and driver which could be utilized to serve DOJ and anticipates the availability of more equipment and personnel in the near future. Executive insists that the evidence of record before the Commission fails to support Edwards' assertion that the subject contract may be awarded only to a "disadvantaged small business". Executive asserts that it qualifies as a small business within the meaning of 15 U.S.C. 632, and that DOJ may not designate Edwards as the sole source of service.

In reply, Edwards contends that the internal guidelines of DOJ establish the following contract priority list for contract awards: (a) the federal prison system, (b) national associations for the blind, (c) General Services Administration, (d) "Section 8A" business, and (e) public bid. In support of the binding nature of this preference system, Edwards relies on the provisions of 41 C.F.R. 81-1.1300, et seq.

The Compact, Title II, Article XII, Section 4(d)(3) mandates,

To enable the provision of service for which there is an immediate and urgent need to a points or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service. (Emphasis supplied.)

There is no dispute that DOJ has an immediate need for service as evidenced by the contract proposal for service from the effective date thereof through September 30, 1979. The issue for resolution, therefore, is whether there is "no carrier service capable of meeting such need". Normally, our inquiry into this matter would cease upon our determining -- as we hereby do, because we must upon the facts and the law -- that Beltway and Executive hold appropriate certificates of public convenience and necessity and are ready, willing and able to provide the proposed service at a rate which is not so high as to constitute an embargo. In the instant case, however, we must confront the question whether DOJ is precluded by law from engaging the services of a certificated carrier, and, if so, whether the said carriers are thereby rendered incapable of performing the needed service within the meaning of Section 4(d)(3) of the Compact: in short, does federal procurement law override the Compact?

Turning first to the face of the contract solicitation, it appears that the procurement was negotiated pursuant to 41 U.S.C. 252(c) 3/ and 15 U.S.C. 637(a)(2). 4/ Essentially, these provisions authorize (but do not compel) DOJ to contract for service with the SBA, and for the SBA, in turn, to subcontract with a small business. 15 U.S.C. 631(a) provides, in part,

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government . . . be placed with small-business enterprises . . . and to maintain and strengthen the overall economy of the Nation.

For purposes of the Small Business Act, "a small-business concern shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation". 15 U.S.C. 632. The Federal Procurement Regulations adopt this definition, 5/ and further provide that any concern bidding on a contract for passenger transportation is classified as small if its number of employees does not exceed 500 persons. 6/ Based upon our review of each carrier-party's annual report, Edwards, Beltway and Executive all qualify as small business concerns, and, in our view, no one is dominant in its field of operation, i.e., transportation of passengers in vehicles with a seating capacity

3/ 41 U.S.C. 252(c) provides that "[u]nless purchases and contracts for property and services shall be made by advertising, as provided in §253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if . . . (15) otherwise authorized by law."

4/ 15 U.S.C. 637(a)(2) provides that "[u]nless it shall be the duty of the [Small Business] Administration and it is empowered, whenever it determines such action is necessary . . . (2) to arrange for the performance of such contracts [between SBA and other instrumentalities of the United States government] by negotiating or otherwise letting subcontracts to small business concerns or others . . . as may be necessary to enable the Administration to perform such contracts."

5/ 41 C.F.R. 81-1.701-1(a).

6/ 41 C.F.R. 81-1.701-1(g).

for 15 passengers or less. 7/ Thus, relying on the record in this proceeding and the records of the Commission subject to official notice, we can derive no reason on the basis of "small business" status for preferential treatment among these carriers.

Accordingly, if there is a limitation on DOJ's contracting authority it must stem from the provisions of federal procurement law relating to purchases from minority owned businesses.

As noted above, Edwards has cited for our consideration subpart 1-1.13 of Title 41 of the Code of Federal Regulations. These regulations contain policies, procedures and contract clauses applicable to the participation of minority business enterprises in government procurement which are designed to carry out the purposes of Executive Order 11625 dated October 13, 1971. Section 1-1.1302 requires the establishment of minority business enterprise programs by agencies engaged in procurement activities so as to obtain the maximum practical participation of said enterprises in government procurement. Among the minimum steps to be taken by each agency are the following:

- (1) Seek out minority business enterprises and facilitate the placement of such concerns on the agency's source list;
- (2) Solicit offers from the minority business enterprises on the agency's source lists; and
- (3) Ensure that minority business enterprises will have an equitable opportunity to compete for contracts 8/

Our review of the regulations cited to us leads us to believe that their purpose is to accord special treatment to minority business enterprises so that an equitable level of competition for federal procurement may result. We do not find in the regulations (or in Executive Order 11625) any mandate to prefer business enterprises on the sole basis of race or ethnic origin. 9/ Nor do we find in the evidence any basis to conclude,

7/ For purposes of this discussion we have considered the files of each carrier in light of the criteria set forth in 41 C.F.R. §1-1.701-3.

8/ 41 C.F.R. §1-1.1302(a).

9/ For the purpose of Federal Procurement Regulations, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos and American Aleuts.

or even suspect, that DOJ applied any other criterion than that in designating Edwards as sole source for this contract.

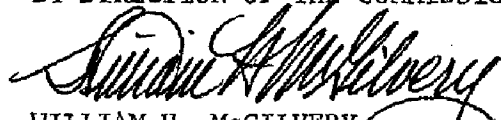
We recognize that promotion of minority business enterprises is a national policy goal and attribute no discriminatory practices to DOJ, but the applicable procurement regulations that have been brought to our attention indicate that the preference of minority-operated businesses is discretionary rather than mandatory.

The priority system established as an internal guideline by DOJ does not by our analysis raise a legal prohibition to DOJ's use of certificated carriers such as Beltway and Executive in this procurement. We conclude that Edwards has failed to sustain its burden of proof that there is no carrier capable of providing this service. Where, as here, a certificated carrier can meet the needs of DOJ, we are absolutely precluded by the Compact, Title II, Article XII, Section 4(d)(3), from granting temporary authority.

In this case the Commission has had to rely upon the presentations of the parties in reaching its interpretations of Federal Procurement Regulations -- a field well removed from our normal area of expertise or jurisdiction. If any party to this proceeding or DOJ or SBA (upon whom copies of this order will be served) desires to present further evidence or argument on this issue in the context of a motion to reconsider this order, we will be happy to consider it.

THEREFORE, IT IS ORDERED that the above-referenced application of Edwards Trucking Company, Inc., is hereby denied.

BY DIRECTION OF THE COMMISSION:


WILLIAM H. MCGILVERY
Executive Director